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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

36

PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]
EAC-04-184-51152

Office: VERMONT SERVICE CENTER

Date: JUN 05 2006

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an elementary and pre-school. It seeks to employ the beneficiary permanently in the United States as an elementary school teacher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and the petitioner had not established that the beneficiary met the education requirement stated on the Form ETA 750, and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 4, 2004 denial, two issues exist in this case. The first issue is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The second issue is whether or not the petitioner has established that the beneficiary met the education requirement stated on the Form ETA 750 as of the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 12, 2001. The proffered wage as stated on the Form ETA 750 is \$72,150.00 per year.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(g)(1) states:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes a letter from the petitioner dated January 5, 2005. Other relevant evidence in the record includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002, and 2003, copies of the petitioner's financial statements for 2003, copies of the beneficiary's Form G-325A Biographic Information, a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2003, a letter from the petitioner dated May 3, 2004, a letter from the petitioner dated May 6, 2004, a letter of experience dated July 17, 2003, the beneficiary's credentials evaluation, copies of the beneficiary's Diploma in Teaching, copies of the beneficiary's teacher's certificate, and a copy of the beneficiary's Bachelor in Theology certificate. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage or the beneficiary's education.

Counsel states on appeal that total assets, a large payroll, and officer compensation can be considered in determining the petitioner's ability to pay the proffered wage, and the beneficiary will be assuming the duties of three employees. Counsel also states that the beneficiary's diploma, combined with her certificate and teaching experience, meets the education requirement.

The first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on February 20, 2001, the beneficiary claimed to have worked for the petitioner beginning in December 1997 and continuing through the date of the ETA 750B. However, the record does not contain any Form W-2's, Form 1099's, or other evidence showing that the beneficiary received compensation from the petitioner.

The record does contain a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2003 showing that the beneficiary received \$17,058.00 in total income. However, according to the beneficiary's Form G-325A Biographic Information, the beneficiary stopped working for the petitioner in June 2001. A letter from the petitioner dated May 3, 2004 also states that "because of [the beneficiary's] undocumented status, her employment with us has been interrupted, but she will be re-employed as soon as she receives her immigrant visa." Thus, compensation received by the beneficiary in 2003 is irrelevant to this case because it was from another employer.²

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002, and 2003. The record before the director closed on

² According to the Form G-325A Biographical Information, signed by the beneficiary on May 5, 2004, the beneficiary has been working for "Cambria Academy Gifted" since September 2002.

June 1, 2004 with the receipt by the director of the petitioner's I-140 petition and supporting documents. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$105,386.00	\$72,150.00*	-\$177,536.00
2002	-\$60,284.00	\$72,150.00*	-\$132,434.00
2003	-\$48,521.00	\$72,150.00*	-\$120,671.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	-\$198,649.00	\$72,150.00*
2002	-\$348,008.00	\$72,150.00*
2003	-\$328,611.00	\$72,150.00*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

Counsel states on appeal that “[t]hrough this entire time, the school possessed total assets in amounts over \$870,000.00.” CIS rejects the idea that the petitioner’s total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, CIS, as shown above, considers net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel states that “[in] [a]ll three years, the [petitioner] maintained a large payroll.” Counsel also states that “the [b]eneficiary’s position would technically not be a “new” position necessitating additional funds. Instead, the position’s salary will come from the paid out salaries as the [beneficiary’s] position is actually the result of combining the tasks of three teachers into one.” A letter from the petitioner dated January 5, 2005 states that “[the beneficiary] will be assuming the duties of three subject teachers who teach grades [three] through [five]. Because there are fewer students in these grades, one excellent teacher can easily take on the responsibility of teaching the same subject to all three grades (albeit at different levels). The displaced teachers will be reassigned.” The record does not name the three teachers, state their wages, or verify their full-time employment. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the duties performed by the three teachers, and the letter specifically points out that the three teachers will not be terminated. If those employees performed other kinds of work, then the beneficiary could not have replaced them. Moreover, even if the wages paid to those three teachers can be considered in determining the petitioner’s ability to pay the proffered wage to the beneficiary, the record does not contain any evidence indicating how much the teachers were paid in each of the years in question. Thus, wages paid to the three teachers cannot be used to pay the beneficiary, and the fact that the petitioner had a large payroll is irrelevant because it does not show whether or not the petitioner has additional fund to pay the beneficiary.

Counsel states that “compensation of officers in these years was approximately between \$96,000.00 and \$115,000.00.” The letter from the petitioner dated January 5, 2005 states that “[i]t cannot afford to lose [the beneficiary],” and counsel states that “[the] passionate declaration [from the petitioner] that the school cannot afford to lose [the beneficiary] is a promise to divert funds from compensation of officers to meet the proffered wage.”

The letter states that “[the petitioner] cannot afford to lose [the beneficiary].” It does not mention or demonstrate the willingness of one of the petitioner’s officers to forego parts of his compensation. Thus, counsel’s interpretation of the statement to mean “a promise to divert funds from compensation of officers to meet the proffered wage” is not corroborated by any supporting evidence in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

CIS (legacy INS) has long held that it may not “pierce the corporate veil” and look to the assets of the corporation’s owner to satisfy the corporation’s ability to pay the proffered wage. However, CIS, in looking at

the totality of the circumstances, may examine the financial flexibility that the owners have in setting their salaries based on the profitability of their corporation. In this case, the petitioner is owned by two officers, but only one received compensation in 2001, 2002, and 2003. According to the record, no evidence indicates that the beneficiary was paid in 2001, and the petitioner had a negative net income and negative net current assets in 2001. Thus, the petitioner still needed \$72,150.00 to meet the proffered wage in 2001. The officer was compensated \$100,507.00 in 2001. \$72,150.00 is 71.8% of the total compensation, and the AAO finds that it is unlikely, without any supporting evidence, that an officer would forego over two-third of his compensation in order to pay the salary of an employee. No evidence indicates that the beneficiary was paid in 2002, and the petitioner needed \$72,150.00 to meet the proffered wage because the petitioner had a negative net income and negative net current assets in 2002. The officer was compensated \$115,210.00 in 2002. \$72,150.00 is 62.6% of the total compensation, and the AAO finds that it is unlikely, without any supporting evidence, that an officer would forego two-third of his compensation in order to pay the salary of an employee. No evidence indicates that the beneficiary was paid in 2003, and the petitioner needed \$72,150.00 to meet the proffered wage because the petitioner had a negative net income and negative net current assets in 2003. The officer was compensated \$96,102.00 in 2003. \$72,150.00 is 75.1% of the total compensation, and the AAO again finds that it is unlikely, without any supporting evidence, that an officer would forego three-fourth of his compensation in order to pay the salary of an employee.

Counsel mentions the petitioner's "audited financial statement[s]," and the record contains copies of the petitioner's financial statements for 2003. According to the accountant's report accompanying the financial statements,³ "[t]he financial statements were not audited." The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report makes clear that the petitioner's financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Moreover, according to the unaudited financial statements, the petitioner's net income in 2003 is \$6,126.00, an amount that is well short of the proffered wage.

The record contains a letter from the petitioner dated May 6, 2004. According to the letter, the petitioner experienced a decrease in its gross earning in 2000 because of an extraordinary expenditure and changes in the county's policies regarding subsidizing childcare services, and it experienced further decrease in 2001 because of the county's policies and the effects of September 11, 2001. The petitioner's gross earning increased in 2002 and 2003, and it "anticipate[s] improved net profits in 2004 and subsequent years." The petitioner appears to be comparing itself to the petitioner in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

Sonegawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons.

³ The certified public accountant who prepared the financial statements and the petitioner's Form 1120 U.S. Corporation Income Tax Returns, [REDACTED] appears to be one of the two officers who own the petitioning corporation.

The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner asserts that unusual circumstances exist in this case, such as the extraordinary expenditure, the county's policies, and the effects of September 11, 2001. However, nothing in the record corroborates that there was an extraordinary expenditure in 2000 because the petitioner's financial information for 2000 does not appear in the record. Nothing in the record details the actual effects of the county's policies on the petitioner. Additionally, nothing in the record indicates that the petitioner was affected by September 11, 2001 or how the petitioner was affected by September 11, 2001. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, it has not been established that 2000 and 2001 were uncharacteristically unprofitable years for the petitioner. As shown above, the petitioner had negative net income and negative net current assets in 2001, 2002, and 2003. Furthermore, the record lacks evidence showing that the years before 2001 and/or after 2003 were profitable and successful years for the petitioner.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director regarding the petitioner's ability to pay the proffered wage.

The second issue in this case is whether or not the petitioner has established that the beneficiary met the education requirement stated on the Form ETA 750 as of the priority date.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of elementary school teacher. On the ETA 750A submitted with the instant petition, block 14 describes the education requirement of the offered position as follows:

Education (number of years)	
Grade School	
High School	
College	4
College Degree Required	BACHELORS
Major Field of Study	

The beneficiary states her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
BETHEL BIBLE INST. Jamaica, New York MT. OLIVE BIBLE INST. Brooklyn, New York	Part-time THEOLOGY	01/98	09/02	Bachelor Degree
MICO TEACHERS COLL. Kingston, Jamaica	EDUCATION	09/94	06/95	COMPLETE DIPLOMA IN TEACHING
ST JOSEPH'S COLLEGE Kingston, Jamaica	TEACHING	09/74	06/77	CERTIFICATE IN 2 YRS TEACHING & 1 YR INTERNSHIP
JAMAICA SCHOOL OF FASHION	Part-time CLOTHING & CONSTRUCTION	09/83	06/85	CERTIFICATE IN CLOTHING CONSTRUCTION

The director concluded that the petitioner had not established that the beneficiary met the education requirement stated on the Form ETA 750 because evidence in the record shows that the beneficiary obtained a bachelor's degree on May 17, 2003.

Counsel states on appeal that the beneficiary's Diploma in Teaching and her teaching certificate are the equivalent of two years of undergraduate work in the United States, "[and] [t]he sixteen years of teaching at Duhaney Park School is more than enough to supplement [the beneficiary's] formal education." Evidence in support of this assertion includes a letter of experience dated July 17, 2003, the beneficiary's credentials evaluation, copies of the beneficiary's Diploma in Teaching, and copies of the beneficiary's teacher's certificate.

The regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a professional that:

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

Moreover, if the AAO were to consider the petition under the “skilled worker” classification, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulations for the skilled worker classification contain a minimum requirement of two years of training or experience. While they do not contain a requirement of a bachelor’s degree, the Form ETA 750 does contain such a requirement. CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The record indicates that the beneficiary holds a Diploma in Teaching. The credentials evaluation states that this degree is the equivalent of one year of undergraduate study in an accredited U.S. college or university. A bachelor’s degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). The Form ETA 750 also requires four years of undergraduate study. Thus, the beneficiary’s diploma does not meet the education requirement stated on the Form ETA 750.

The beneficiary also holds a teacher’s certificate, and the credentials evaluation states that this degree is likewise the equivalent of one year of undergraduate study in an accredited U.S. college or university. Thus, similar to the diploma, the certificate is not a single academic degree that is the foreign equivalent of a four-year U.S. bachelor’s degree. As stated above, the regulation sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree. The combination of a diploma and a certificate does not meet that requirement. Moreover, even if the petitioner can combine the beneficiary’s diploma and certificate, the combination would only result in two years of undergraduate study.⁴

Counsel’s assertion that the beneficiary’s teaching experience supplements the beneficiary’s formal education is without merit. Even though three years of experience equates to one year of education for non-immigrant H1B petitions, this case deals with immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor’s degree on the Form ETA 750. The petitioner’s actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director’s decision to deny the petition as a result of the petitioner’s

⁴ The record contains a copy of the beneficiary’s Bachelor in Theology certificate. The beneficiary’s received her Bachelor in Theology after the priority date and thus the bachelor’s degree cannot be considered. The beneficiary’s certificate in clothing construction also cannot be considered because it was not evaluated in the credentials evaluation, there is no evidence indicating that the beneficiary received the certificate, and according to the Form ETA 750B, it took the beneficiary two years to complete the certificate and thus the certificate does not meet the four-year bachelor’s degree requirement.

inability to establish that the beneficiary met the education requirement stated on the Form ETA 750 as of the priority date will be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.